IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2007 Session

STATE OF TENNESSEE v. ROBERT WARREN TILLMAN

Direct Appeal from the Criminal Court for Davidson County
No. 2005-A-666 Monte Watkins, Presiding Judge

No. M2006-01716-CCA-R3-CD - Filed April 14, 2008

Following a jury trial Defendant was convicted of one count of attempted rape of a child and one count of aggravated sexual battery. The trial court sentenced Defendant to eight years to serve at 100% for the aggravated sexual battery conviction and eight years to serve at 100% for the attempted rape of a child conviction with the sentences to run concurrently. On appeal, Defendant argues (1) there was insufficient evidence to support a conviction of aggravated sexual battery; (2) the trial court erred in refusing to sit as the thirteenth juror and grant Defendant's motion for judgment of acquittal or Motion for New Trial; (3) the trial court erred in failing to merge the convictions of Defendant; and (4) Defendant was sentenced to an improper percentage for the conviction of attempted rape of a child. After a thorough review of the record, we affirm the trial court's judgment as to the sufficiency of the evidence to support a conviction of aggravated sexual battery and conclude that the trial court fulfilled its role as the thirteenth juror. As to Defendant's third argument, we merge the attempted rape of a child conviction into the aggravated sexual battery conviction thereby creating an effective sentence of eight years to be served at 100% pursuant to Tennessee Code Annotated section 40-35-501(a)(2)(i)(1)(2)(H). This cause is remanded to the trial court for entry of a corrected judgment. Lastly, had the conviction for attempted rape of a child not been merged into the conviction for aggravated sexual battery, Defendant would be entitled to an amended judgment reflecting a 30 percent release eligibility date on the sentence for attempted rape of a child.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Criminal Court Affirmed in Part and Remanded in Part

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Carla Kent Ford, Murfreesboro, Tennessee, for the appellant, Robert Warren Tillman

Robert E. Cooper, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Hugh Garrett, Assistant District Attorney General; and Leah Wilson, Assistant District Attorney General, for the appellee, the State of Tennessee

OPINION

Defendant was charged with two counts of rape of a child, two counts of aggravated sexual battery, and two counts of rape. A jury convicted him of the lesser included offense of count one attempted rape of a child and it convicted him of count four, aggravated sexual battery. Because the jury found Defendant not guilty of the other counts, this Court will only address the facts surrounding counts one and four. Count one, as described by the State when making an election of offenses, occurred when "the victim was at the residence of the defendant . . . and spent the night there. K.B. [this Court refers to minor victims by their initials] was lying on the couch when the defendant sat down next to her. The defendant then lay on top of her and had sexual intercourse with her." Count four was presented by the State as follows: "the defendant placed his hands on the inner thighs of the victim. This occurred when the defendant was having sexual intercourse with the victim at the residence . . . ."

I. Background

Sometime after October 2001, the victim, K.B., spent the night at Defendant's home. The victim had done this on numerous previous occasions as she was friends with Defendant's daughter, Heather, and his step-daughter, Brandi. K.B. testified that Defendant asked her to watch a movie with him because his daughter "didn't want to watch it with him." The victim stated that Defendant pulled out the sleeper sofa for her and sat down next to her on the bed. She testified that they were sitting on the bed and Defendant "kind of like fell on me." She then clarified that she meant he pushed her down and got on top of her. The victim testified that Defendant kissed her face and mouth. According to the victim, Defendant pulled her shorts off and then Defendant touched her thighs and unzipped his pants. He then penetrated her vagina and continued to touch her thighs. The victim stated that she told him to stop and cried but that Defendant did not stop until he "finished on his own." When the victim woke up the next morning, Defendant was laying next to her and had his arm draped over her. The victim testified that he was not in the bed with her when she fell asleep after the incident and she did not know when he came back into the living room.

The victim testified that in late 2004 she was having medical problems and was receiving counseling because she was cutting herself. She told her school counselor about the cutting and was sent to the hospital. At the hospital, the victim told the nurse what happened between Defendant and her three years prior. The victim also testified that she told her parents around this time. The victim's parents took her to the police station in November of 2004 to speak with a detective about the incident. The police had her make a "controlled phone call" to Defendant. This phone call was played for the jury.

In the phone call, Defendant neither admitted nor clearly denied the victim's characterizations of the events that night. The victim asked many times if he remembered having sex with her and he did not respond. His only recollection on the tape regarding the evening at issue was that they fell asleep on the couch bed and he woke up with his arm draped over her. He stated a few times on the tape that "I don't know what you're talking about." The victim testified that as a result of this

incident she did not go over to Defendant's home as often as before and that she never spent the night there again.

Corie Bland testified for the State. Ms. Bland testified that the victim told her about what happened six months to a year after it occurred. The victim had already testified that Ms. Bland was the first person she told about the incident with Defendant.

Detective Matt Chance was the investigating officer. He testified that in December of 2004 the victim's parents brought her to the police station. The victim wrote out a statement about what happened at Defendant's residence. He also recorded the controlled phone call. Detective Chance also notified the Department of Children's Services because the incident occurred when the victim was under thirteen. Detective Chance testified that DCS conducted a forensic interview but that he was not present for it. Detective Chance also stated that he wrote out a list of points and suggestions for the victim to use in the phone call because she was very nervous about making the call.

Defendant testified in his own behalf at the trial. Defendant stated that on the night in question his daughters (Heather and Brandi), the victim, and another girl (Stephanie) invited him to watch a movie with them. He stated that he usually sits on the love seat but that Stephanie was seated there so he sat down on the sofa bed next to Heather and Brandi. He testified that the victim was sitting on the other end of the sofa bed and that his daughters were in between them. Defendant testified that the next thing he remembered was Heather waking him up and telling him to go to bed. Defendant stated that Stephanie was still seated on the love seat laughing at him because he had fallen asleep and his arm was draped over the victim. Defendant said he got up then and went to his bedroom, closed the door, and went to sleep. Defendant testified he woke up in his bedroom the next morning.

As to the controlled phone call, Defendant stated that at the time of the call he was working nights and would go to bed around noon everyday after taking sleeping pills and drinking a "few beers." It was between 7:00 p.m. and 8:00 p.m. when the victim called Defendant. Defendant testified that this is when he sleeps the "heaviest." Defendant stated that he thought the victim called to talk about her grandmother who had recently passed away. He testified that they had a conversation about grandmothers when his passed away in 2001. As the phone call progressed, he testified that he was confused because he had just been awakened. He testified that when someone wakes him from sleep he often makes no sense and does not understand or remember what is said to him. Defendant testified that he did not hang up on her because, due to her past behavior, she would just call right back and "get ugly."

Defendant's daughter, Heather Tillman, testified for the defense. Ms. Tillman testified that she, Brandi, Stephanie, and K.B. asked Defendant to watch a movie with them. Ms. Tillman stated that she went to bed during the movie because she was tired and her sister followed shortly after. She testified that when the movie was over Stephanie came into her room and told her that her dad and K.B. were still asleep on the couch. Ms. Tillman went into the living room and woke up her father and told him to go to bed. Ms. Tillman testified that her dad's arm was draped over K.B. but

that they were both fully clothed. She stated that her dad went to bed and closed the door to his bedroom after she woke him up. Ms. Tillman also testified that on occasion when she has awakened her father that he is easily confused and does not make sense.

Defendant's step-daughter, Brandi Glassman, also testified for the defense. She stated that on the night in question she pulled out the sleeper sofa so she and her friends could watch a movie. Ms. Glassman stated that they invited Defendant to watch a movie with them and that Defendant sat on the sleeper sofa next to Heather and her. She testified that she left the living room before the movie was over to go to bed and that Stephanie, K.B., and Defendant were still in the living room. She testified that after the movie was over Stephanie told Heather that Defendant and K.B. were still asleep. Ms. Glassman added that Heather went into the living room with Stephanie and that she returned a few minutes later and went back to bed. Ms. Glassman stated that Stephanie did not return to their bedroom that night. The next morning, Ms. Glassman was the first person to awaken and she went into the living room and saw K.B. asleep on the sofa bed and Stephanie asleep on the loveseat.

Stephanie Stroud testified that she was at Defendant's home on the night in question and that she slept on the love seat in the living room and that K.B. slept on the sofa bed. Ms. Stroud stated that Defendant sat on the sofa bed next to Heather and Brandi because she was sitting on the love seat. Ms. Stroud added that she told Heather that her dad and K.B. were still sleeping after the movie was over and that Heather told her dad to go to bed and that Defendant did so. Ms. Stroud stated that when she woke up, the victim was still asleep on the sofa bed.

Dawn Chrzan was the final witness for the defense. Ms. Chrzan testified that she lived with Defendant and his daughters from July 2002 through September 2002. Ms. Chrzan stated that during this time she remembered the victim spending the night at Defendant's home with his daughters.

II. Analysis

Defendant challenges the sufficiency of the evidence to convict him of aggravated sexual battery, the trial court's failure to act as the thirteenth juror, the decision of the trial court to not merge his convictions, and the classification of his sentence for attempted rape of a child as a violent (100%) offender.

A. Sufficiency of the Evidence

Defendant argues that the evidence presented at trial was insufficient to sustain a conviction for aggravated sexual battery. Defendant concedes that the State offered proof that he touched the victim's inner thighs, but contends that this was "one continuous act of the sexual intercourse." Defendant also argues that there was insufficient evidence that he touched her inner thigh in a "sexual way."

At the time of the offense, Tennessee Code Annotated section 39-13-504 (2001) provided in pertinent part:

> (a) Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:
>
> . . .
>
> (4) The victim is less than thirteen (13) years of age.

Tennessee Code Annotated § 39-13-501(2),(6) provided:

> (2) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock or breast of a human being;
>
> . . .
>
> (6) "Sexual contact" includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979). In a jury trial, great weight is given to the jury verdict; it accredits the State's witnesses and resolves all conflicts in favor of the State. *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

The issue of whether Defendant touched the victim for sexual arousal or gratification is a question of fact to be determined by the jury. Further, Tennessee Code Annotate section 39-13-501 (6) does not require that Defendant become sexually aroused or gratified, nor does it require that the touching result in sexual arousal or gratification. *See State v. Chisenhall*, No. M2003-00956-CCA-R3-CD, 2004 WL 1217118, at *4 (Tenn. Crim. App., at Nashville, Feb. 3, 2004) (No Tenn. R. App. P. 11 application filed). The statute merely requires touching that can be "*reasonably construed* as being for the purpose of sexual arousal or gratification." *Chisenhall*, 2004 WL 1217118 at * 3; T.C.A. § 39-13-501(6); *See State v. Steven Webster*, No. W1999-00293-CCA-R3-CD, 1999 WL 1097820, at *1-*2 (Tenn. Crim. App. Nov. 22, 1999), *perm. app. denied* (Tenn. June 19, 2000).

This Court in *State v. Cano*, No. M2004-02639-CCA-R3-CD, 2005 WL 2139406 at * 3 (Tenn. Crim. App., at Nashville, June 21, 2004), *perm. app. denied* (Tenn. Feb. 6, 2006), dealt with the issue of touching for sexual arousal or gratification. In *Cano*, the victim, who was under thirteen years of age, testified that the defendant in that case had touched her intimate parts on numerous occasions. *Id*. at *3. This Court held that it was within the jury's "prerogative" to accredit her testimony and "a rational trier of fact could also have found beyond a reasonable doubt that the defendant's conduct could be "reasonably construed as being for the purpose of sexual gratification." *Id*. at *3.

In the instant case, the prosecutor presented the jury with evidence that the victim was less than thirteen years of age at the time the incident occurred and that Defendant touched her inner thighs for the purpose of sexual gratification. It is irrelevant that this occurred during the attempted sexual intercourse. The jury accredited this testimony which is well within their prerogative. This Court has held, "[W]e recognize that jurors may use their common knowledge and experience in making reasonable inferences from the evidence." *State v. Meeks*, 876 S.W.2d 121, 131 (Tenn. Crim. App. 1993). The verdict resolved any conflicts in favor of the state. *See State v. Sommerall*, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). After a thorough review of the record, we find that there was sufficient evidence to convict Defendant of aggravated sexual battery. Accordingly, Defendant is not entitled to relief as to this issue.

B. Thirteenth Juror

The trial court has a duty to serve as the thirteenth juror. Tenn. R. Crim. P. 33(d); *see State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). If the trial court disagrees with the jury about the weight of the evidence, Rule 33(d) authorizes the trial court to grant a new trial. However, the Rule does not specifically require that the trial court make a specific statement on the record approving the jury's verdict as the thirteenth juror. When a trial court overrules a motion for new trial, this Court may presume that the trial court has served as the thirteenth juror. *State v. Moats*, 906 S.W.2d 431, 434 (Tenn. 1995). Only if the record contains statements by the trial court indicating disagreement or dissatisfaction with the jury's verdict may this Court reverse the trial court's judgment. *Carter*, 896 S.W.2d at 122.

In the instant case, the trial court made the following statement at the sentencing hearing:

> Well, I do remember this case very well, and the testimony in the trial in this particular case. I will state quite frankly the Court had some questions about what actually happened in this particular case. The Court was not all together clear about it because of the various testimony from the various witnesses. However, the jury did come back and convict Mr. Tillman of two separate counts, attempted rape of a child and aggravated sexual battery.

It is on this statement that Defendant bases his argument. However, at the hearing on the motion for new trial, the trial court stated:

> The Court believes that this was truly a classic case where a jury question was presented. We had the prosecution's case and we had the defense's case, and the jury sided, essentially, with both, in that it found the defendant guilty on certain counts and not guilty on other counts. So it was clearly a jury question, and the Court believes that the evidence was sufficient that had been presented to the jury for it to render its verdict.

The trial court's statements at the sentencing hearing do not rise to the level of dissatisfaction or disagreement required in *Carter*. The record does not reflect that the trial court, at any time, disagreed with the jury's verdict. The court's statements at the motion for new trial hearing validated the jury's verdict in stating that the evidence was sufficient to support the verdict. Because there is no requirement that a trial court specifically state that it is acting as the thirteenth juror and because, in the instant case, the judge did approve the verdict and deny the motion for new trial, the trial court fulfilled its role as the thirteenth juror. Accordingly, Defendant is not entitled to relief as to this issue.

C. Merger of the Convictions

Defendant argues that his two convictions should have been merged into one conviction, with the conviction of aggravated sexual battery being merged with the conviction for attempted rape of a child. Defendant argues that the offenses should merge this way because the aggravated sexual battery conviction, as elected by the district attorney, was part of the attempted rape of a child. The conviction for aggravated sexual battery arose out of Defendant's touching of the victim's inner thighs while Defendant was having sexual intercourse with the victim. The State concedes that the convictions should have been merged, however, it contends that the attempted rape of a child conviction should merge into the aggravated sexual battery conviction. The State bases its argument on the fact that aggravated sexual battery is an offense that the legislature requires be served at 100% regardless of the range of the offender. Although these are both Class B felonies, the State contends that the harsher punishment makes aggravated sexual battery the greater offense.

The Fifth Amendment to the United States Constitution protects defendants from being subjected to jeopardy more than once for the same offense. The Tennessee State Constitution also contains a similar "double jeopardy" clause. *Tenn. Const. art. I, § 10.* Our Supreme Court set out

standards to determine if a defendant had received multiple punishments for the same offense. A reviewing court is directed to consider the following:

(1) the statutory elements of the offense;

(2) the evidence used to prove the offenses;

(3) whether there were multiple victims or discrete acts; and

(4) the purposes of those respective statutes

State v. Denton, 938 S.W.2d 373, 381 (Tenn. 1996).

In the instant case, Defendant was convicted of aggravated sexual battery for touching the Defendant's thighs when he was having sexual intercourse with her (the attempted rape of a child conviction). The elements to convict a defendant of attempted rape of a child are that the defendant took a substantial step towards the commission of the crime, that he had the requisite intent to sexually penetrate the victim, and that the victim was less than thirteen years of age. T.C.A. §§ 39-12-101, -13-522. The essential elements of aggravated sexual battery are that the defendant touched the intimate parts, that the touching was for sexual gratification or arousal, and that the victim was less than thirteen years of age. T.C.A. 39-13-504. Clearly, these elements are not the same as far as double jeopardy is concerned.

However, continuing through the test, we are required to look at what evidence was used to convict the defendant of the crimes. The State elected to charge the aggravated sexual battery as occurring **when** the defendant was having sexual intercourse with the victim (the attempted rape of a child). Thus, the evidence used to convict Defendant was the same for both crimes. Step three of the test requires us to look at the number of victims and acts at issue. Defendant's case only involves one victim and one discrete act of touching. Lastly, step four directs us to look at the statutory purposes of the crimes. Both the aggravated sexual battery statute and attempted rape of a child statute (as a lesser included offense of rape of a child), were designed to punish and deter sexual crimes against children under age thirteen. *See State v. Mixon*, 983 S.W.2d 661, 676 (Tenn. 1999).

In *State v. Brandon Wallace*, No. W2005-02514-CCA-R3-CD, 2006 WL 3208557 * 3 (Tenn. Crim. App. at Jackson, Nov. 7, 2006) *perm. app. denied* (Tenn. March 26, 2007), this Court stated that "under the merger concept, the lesser offense is not extinguished, but simply merged with the greater offense resulting in *one* judgment of conviction." In the instant case, each conviction is a Class B felony. However, the conviction for attempted rape of a child requires Defendant to serve eight years at 30 percent, whereas the conviction for aggravated sexual battery would require Defendant to serve eight years at 100 percent. T.C.A. §§ 40-35-501(b), (i)(1)(2)(H). When the court determines that two convictions cannot both stand, the conviction for the greater offense must stand and the conviction for the lesser offense must merge into the greater charge. *State v. Davis*, 613

S.W.2d 218 (Tenn. 1981). The greater offense is the offense with the most severe punishment. *State v. Beard*, 818 S.W.2d 376, 379 (Tenn. Crim. App. 1991).

In the instant case, the trial court erred in refusing to merge the convictions because the aggravated sexual battery conviction was part of the continuous act of attempted rape of a child. The conviction for attempted rape of a child is the lesser offense because the punishment is less than the punishment for aggravated sexual battery. Therefore, we remand to the trial court for entry of a corrected judgment reflecting this merger and one conviction for aggravated sexual battery to be served at 100 percent.

D. Attempted Child Rape

Defendant's final argument is that the trial court erred in erroneously requiring Defendant to serve his conviction for attempted rape of a child at 100 percent. The State concedes that the trial court erred. Because attempted rape of a child is not one of the crimes listed in Tennessee Code Annotated section 40-35-501(i)(1)(2)(A-K), we agree and, had the conviction for attempted rape of a child not been merged into the conviction for aggravated sexual battery, the judgment would had to have been amended to show a correct service time of 30 percent.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court as to the sufficiency of the evidence supporting Defendant's convictions and we remand to the trial court for an entry of a corrected judgment reflecting the merger of the conviction of attempted rape of a child into that of aggravated sexual battery.

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THOMAS T. WOODALL, JUDGE